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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/522,148	01/24/2005	Mate Hidvegi	3494-0104PUS1	9131

2292 7590 07/17/2007  
BIRCH STEWART KOLASCH & BIRCH  
PO BOX 747  
FALLS CHURCH, VA 22040-0747

EXAMINER
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DAVIS, DEBORAH A

ART UNIT	PAPER NUMBER
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1655

NOTIFICATION DATE	DELIVERY MODE
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07/17/2007

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mailroom@bskb.com

## Office Action Summary

Application No.

10/522,148

Applicant(s)

HIDVEGI ET AL.

Examiner

Deborah A. Davis

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 April 2007.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 16-37 is/are pending in the application.
- 4a) Of the above claim(s) 22-29, 31-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 16-21, 30 and 37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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**DETAILED ACTION*****Election/Restrictions***

Applicant's election with traverse of claims 16-21, 30 and 37 in the reply filed on April 16, 2007 is acknowledged. The traversal is on the ground(s) that the examiner has misapplied PCT Rules 13.1 and 13.2. Applicant asserts that all the claims are related in that they all require fermenting wheat germ in an aqueous medium. This is not found persuasive because the claims included multiple products, processes of making and processes of use. Applicant is allowed to elect a product, a method of making that product and a method of using. Although the claims have fermented wheat germ in common, they must relate to a single inventive concept. Group I is drawn to enhancing weight gain and Group II is decreasing the likelihood of mycoplasma and Group III is drawn to a method of reducing coccidiosis in an animal. The requirement is still deemed proper and is therefore made FINAL.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 16-21, 30 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hidvegi et al (WO 99/08694).

A method of enhancing weight gain and efficiency of feed conversion in a farm animal comprising feeding a fodder to a farm animal wherein the fodder comprises an extract of fermented wheat germ, and wherein enhancing weight gain and efficiency of feed conversion is effected by the fermented wheat germ extract is apparently claimed.

Hidvegi et al. teach a fermented wheat germ extract obtained by fermenting wheat germ with *Saccharomyces cerevisiae*, including in a form known as a "dried vegetal material" and that the dried vegetal material can be within the food industry - e.g., a dietary supplement (see, e.g., page 5, line. 29 - page 6, line 4). Hidvegi et al. do not expressly teach adding the fermented wheat germ extract to fodder (to enhance weight gain), as instantly claimed.

However, the cited reference beneficially teaches that the fermented wheat germ extract is therapeutically useful as an immunostimulatory agent when administered to animals (see entire document including Abstract, Examples, Claims).

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add a therapeutically effective amount of the wheat germ extract taught by Hidvegi et al. to fodder (animal feed) so as to provide the immunostimulatory effect to farm animals based upon the beneficial teachings provided by the cited reference. The adjustment of particular conventional working conditions (e.g., determining an effective amount of fermented wheat germ extract therein) is deemed merely a matter of judicious selection and routine optimization, which is well

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within the purview of the skilled artisan. Please note that giving a farm animal the dried vegetal material (i.e., fermented wheat germ extract) within a food such as fodder would intrinsically enhance weight gain therein (as instantly claimed).

Thus, the invention as a whole is *prima facie* obvious over the reference, especially in the absence of evidence to the contrary.

### ***Response to Arguments***

Applicant argues previous arguments against the reference of Hidvegi et al dated 12-07-06 is not found to be persuasive.

Applicant argues that there are structural differences in the preparation and fodder premix or nutriment premix comprising fermented wheat germ extract of Hidvegi and the instantly claimed invention. Applicant argues that Hidvegi teaches the preparation of fermented and dried vegetal material which is obtainable by fermenting wheat germ with baker's yeast in an aqueous medium, filtering the fermented liquid cell free and drying it - which does not include the biomass. Applicant argues that in comparison, the extract used in the present invention is a homogenized mixture in 1:1 rate of dried liquid and biomass.

In response, the wheat germ taught by Hidvegi is formed from the fermented liquid of wheat germ that would appear to include biomass since wheat germ is from plant material. With respect to applicant's argument that Hidvegi teaches the fermented liquid to be cell free is not found persuasive because applicant readily admits in the instant specification that the filtered fermented liquid from the wheat germ contained

practically no cells (i.e. cell free, see specification page 6, paragraph 3, line 2, e.g.), therefore, Hidvegi appears to remain obvious over the instant claimed product and method of preparation. Although applicant argues ratios of the instant extract, this is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of the skilled artisan. With respect claims 19-21, drawn to the method of enhancing weight gain in an animal by feeding the animal a fodder comprising an extract of fermented wheat germ still read on the reference of Hidvegi because it only requires a fodder comprising fermented wheat germ. Although applicant argues that the motivations between to the reference of Hidvegi and the instant claims are different, (i.e. Hidvegi teaches inhibition of metastasis and the instant claims teaches enhancing weight gain) does not negate the fact that giving a farm animal the dried vegetal material (i.e., fermented wheat germ extract) within a food such as fodder would intrinsically enhance weight gain therein. The reference of Hidvegi is still deemed obvious over the instant claims.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the

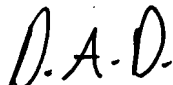
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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah A. Davis whose telephone number is (571) 272-0818. The examiner can normally be reached on 8-5 Monday thru Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, McKelvey Terry can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Deborah A. Davis  
Patent Examiner  
Art Unit 1655  
July 2007

  
CHRISTOPHER R. TATE  
PRIMARY EXAMINER